Koperasi Pegawai-Pegawai Kerajaan Negeri Perlis Bhd v Wan Kiah @ Wan Noriah bt Mahat & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO R-02–1517–07 OF 2012
AZAHAR MOHAMED, ZAWAWI SALLEH AND HAMID SULTAN JJCA
8 NOVEMBER 2013

Civil Procedure — Appeal — Appeal to Court of Appeal — Points of law and fact not pursued at first instance — Dispute on development of lands for purpose of housing estate — Appeal submission contained mixed questions of law and facts not argued in trial court — Whether submission exceeded scope of what had been agreed upon in trial court — Whether points of law could be canvassed even if not raised at trial court

The subject matter of the dispute in the present appeal stemmed from an agreement executed by the former chairman of the appellant on behalf of the appellant with land owners for the development of the lands for the purpose of a housing estate. The appellant was a co-operative society which was subjected to the Co-Operative Societies Act 1993 ('the Act'). The appellant's submission contained dispute of facts which was not argued before the present court and/or placed before the trial court. In essence, the submission consisted of mixed question of law and facts exceeding the scope of what had been agreed in proceedings prior to the present court. The appellant argued that, inter alia, a point of law could be canvassed notwithstanding it was not raised at the trial court.

Held, dismissing the appeal with costs:

(1) The appellant had exceeded the scope of what had been agreed and had submitted on additional factors on why the appeal should be allowed. It was not appropriate to entertain any additional issues which the court had not consented to, more so when the judgment had been reserved. The court would not lend its hand to assist contracts which were illegal at the trial stage or appellate stage and notwithstanding that judicial notice could be taken at any stage, either at the court of first instance or at the appellate stage irrespective of whether illegality was pleaded or not. Such conduct would lead to procedural unfairness and if the court acted on those parts of the submission it would in actual fact compromise the integrity of the decision-making process (see paras 2 & 8).

(2) Procedural fairness to the respondent at the appeal stage was a sine qua non by virtue of art 8 of the Federal Constitution ('Constitution') as the

respondent has already secured the 'fruit of litigation' and the court would be slow in depriving the fruits when issues that were not canvassed at the trial stage was taken up at the appellate stage. In addition, when the respondent had obtained judgment which was tangible in nature amounting to property, then art 13 of the Constitution which stated no person would be deprived of property save in accordance with law would become applicable (see para 9).

(3) The issue of liability in this case must not be dealt with for the first time at the appellate stage, more so when the respondent would lose the benefit of trite principles and many others which needed to be canvassed by way of evidence to negate the attempts of the appellant to demolish the respondent's claim, unless the document complained of was ex facie illegal. Any attempt to seek a crucial scrutiny as to validity on the factual matrix of the instant case must procedurally be placed before the trial court and it could not even be attempted at the appellate stage as what the appellant had attempted in the submission (see paras 10 & 13).

[Bahasa Malaysia summary

Perkara pertikaian di dalam rayuan ini berpunca daripada perjanjian yang dilaksanakan oleh bekas pengerusi perayu bagi pihak perayu dengan pemilik tanah untuk pembangunan tanah bagi tujuan estet perumahan. Perayu adalah koperasi yang tertakluk kepada Akta Koperasi 1993 ('Akta'). Hujahan perayu mengandungi pertikaian fakta yang tidak dihujahkan di hadapan mahkamah ini dan/atau dikemukakan di hadapan mahkamah bicara. Pada dasarnya, hujahan mengandungi soalan undang-undang bercampur dan fakta melebihi skop apa yang telah dipersetujui di dalam prosiding sebelum mahkamah ini. Perayu berhujah bahawa, antara lain, isu undang-undang dikemukakan walaupun ia tidak dibangkitkan di mahkamah bicara.

Diputuskan, menolak rayuan dengan kos:

(1) Perayu telah melebihi skop apa yang dipersetujui dan telah menghujahkan atas faktor tambahan mengapa rayuan patut dibenarkan. Adalah tidak wajar untuk mendengar apa-apa isu tambahan yang mana mahkamah tidak memberi izin, lebih lagi apabila penghakiman telah ditangguhkan. Mahkamah tidak akan membantu kontrak yang tidak sah pada peringkat bicara atau peringkat mahkamah rayuan dan walaupun notis kehakiman tersebut boleh diambil pada bila-bila masa, sama ada di mahkamah tindakan dimulakan atau pada peringkat mahkamah rayuan tanpa mempedulikan sama ada ketaksahan diplidkan atau tidak. Tindakan sedemikian akan membawa kepada ketidakadilan prosedur dan jika mahkamah bertindak atas bahagian hujahan tersebut ia akan sebenarnya kompromi integriti proses membuat keputusan (lihat perenggan 2 & 8).

(2) Keadilan prosedur kepada responden pada peringkat rayuan adalah *sine qua non* mengikut perkara 8 Perlembagaan Persekutuan ('Perlembagaan') memandangkan responden telah menjamin 'fruit of litigation' dan mahkamah akan perlahan dalam menafikan usaha ini apabila isu-isu yang tidak dikemukakan di peringkat bicara dibangkitkan di peringkat mahkamah rayuan. Selanjutnya, apabila responden memperolehi penghakiman yang bersifat ketara yang merupakan hartanah, oleh itu perkara 13 Perlembagaan yang menyatakan tiada seorang pun boleh dilucutkan dengan hartanya kecuali mengikut undang-undang boleh diguna pakai (lihat perenggan 9).

(3) Isu liabiliti dalam kes ini tidak perlu dikendalikan untuk kali pertama di peringkat Mahkamah rayuan, lebih lagi apabila responden akan kehilangan faedah prinsip-prinsip nyata dan lainlain lagi yang perlu dikemukakan melalui keterangan untuk menyangkal percubaan perayu untuk mematahkan tuntutan responden, kecuali dokumen yang diadukan adalah ex facie tak sah. Apa-apa percubaan untuk memohon penelitian penting terhadap kesahan matriks fakta kes ini mesti secara prosedur dikemukakan di hadapan mahkamah bicara dan tidak boleh dikemukakan di peringkat mahkamah rayuan seperti apa yang dilakukan oleh perayu dalam penghujahannya (lihat perenggan 10 & 13).]

Notes

For cases on appeal to Court of Appeal, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 857–869.

Cases referred to

Keliment anak Nyapong & Ors (suing for themselves and their parents and other siblings) v Usha Bina Sdn Bhd [2009] 1 MLJ 98; [2008] 1 LNS 550, HC (refd)

Lim Kar Bee v Duofortis Properties (M) Sdn Bhd [1992] 2 MLJ 281, SC (refd)

Legislation referred to

Co-Operative Societies Act 1993
Federal Constitution arts 8, 8(1), 13
Federal Constitution [IND] art 14

Appeal from: Suit No 22–09 of 2007 (High Court, Kangar)

Dato' Brijnandan Singh (Jamil bin Mohamed Shafie with him) (Jamil Mohamed Shafie & Assoc) for the appellant.
Loo Yook Khin (Law Chamber of YK Loo & Cheng) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant's appeal came up for hearing on 30 September 2013. The

learned counsel for the appellant indicated to us that they are relying on only one issue relating to law ie *ex facie illegal* which was not pleaded and argued in the court below which has now been set out in the memorandum of appeal. Both parties agreed that the determination of the issue as well as the preliminary issue whether the court ought to allow the issue to be ventilated in the first instance at the appellate stage will be sufficient to dispose of the appeal.

[2] We heard the arguments on the issues and reserved judgment to 8 November 2013 and invited parties to file further submission on the issues agreed. Both have filed submissions, however, we note that the appellant had exceeded the scope of what has been agreed and had submitted on additional factors on why the appeal should be allowed. We do not think it is appropriate to entertain any additional issues which the court has not consented to, more so when the judgment has been reserved.

[3] Such conduct by counsel will lead to procedural unfairness and if the court acts on those parts of the submission it will in actual fact compromise the integrity of the decision making process. In consequence we have only dealt with the two agreed issues in this appeal. We will elaborate further on the issue of procedural equality and/or procedural unfairness further in the judgment.

[4] My learned brothers Azahar Mohamed JCA and Zawawi Salleh JCA have read the draft judgment and approved the same. This is our judgment.

BRIEF FACTS

[5] The appellant is a co-operative society and is subject to Co-Operative Societies Act 1993 (Act). The subject matter of the dispute originates in relation to an agreement dated 14 March 2002 executed by Rosley bin Mat (Chairman of the appellant at the material time), for the appellant with land owners for the development of the lands for the purpose of a housing estate.

[6] The learned counsel for the appellant strenuously argued before us, inter alia, (i) a point of law can be canvassed notwithstanding it was not raised at the trial court; (ii) under the Act and by-laws a document to be enforced against the appellant must be executed by the chairman, secretary and the treasurer or such other person or persons approved by the board and bear the seal of the society; (iii) it is not sufficient for the document itself to be signed by the Chairman bearing the seal of the society; (iv) as the execution of the document and/or documents is in breach of the Act and/or by laws it is unenforceable, void ab initio and/or illegal in clear breach of a statutory provision.

[7] The learned counsel for the appellant had filed a lengthy submission dated 7 October 2013 totaling to 40 pages. We have gone through the

submission over and over again as it contained dispute of facts which was not argued before us and/or placed before the trial court. In essence the submission consists of mixed question of law and facts exceeding the scope of what have been agreed, before us on 30 September 2013.

[8] We are of the considered view notwithstanding that the court does not lend its hand to assist contracts which are illegal at the trial stage or appellate stage and notwithstanding that judicial notice can be taken at any stage, either at the court of first instance or at the appellate stage irrespective of whether illegality is pleaded or not; where the contract is *ex facie illegal* (Emphasis added), as adumbrated by the Supreme Court in *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281, — must indeed be limited to cases where it is *ex-facie illegal* when the issue is taken up for the first time at the appellate stage. This is so to ensure no procedural unfairness sets in to impinge on the integrity of the decision making process. Procedural unfairness may set in by many forms. One of that is as per the instant case where the appellant agreed to canvass the preliminary issue and one issue of law but went to file 40 pages submission relating to the facts and law.

[9] Procedural fairness to the respondent at the appeal stage is a *sine qua non* by virtue of art 8 of the Federal Constitution as the respondent has already secured what we term as the 'fruit of litigation' and the court will be slow in depriving the fruits when issues that are not canvassed at the trial stage is taken up at the appellate stage. In addition, when the respondent has obtained judgment which is tangible in nature amounting to property, then art 13 of the Federal Constitution which states no person shall be deprived of property save in accordance with law will become applicable. Articles 8(1) and 13(1) of the Federal Constitution read as follows:

> 8(1) All persons are equal before the law and entitled to the equal protection of the law.
>
> 13(1) No person shall be deprived of property save in accordance with law.

[10] Procedural equality is an entrenched constitutional guarantee pursuant to art 8(1) of the Federal Constitution. In the instant case it must be said the issue of liability must not be dealt with for the first time at the appellate stage, more so when the respondent will lose the benefit of trite principles such as admission, estoppel, waiver, *Turquand* rule (if applicable) and many others which need to be canvassed by way of evidence to negate the attempts of the appellant/defendant to demolish the respondent/plaintiff's claim, unless the document complained of is *ex facie illegal*. Learned author's of Nandi 'Civil Ready Referencer' when dealing with art 14 of the Indian Constitution which is similar to art 8(1) of the Federal Constitution on procedural equality has this to say:

Arbitrariness is the very antithesis of Article 14. The principle of reasonableness is an essential element of equality and the procedure contemplated by Art 21 must answer the test of reasonableness in order to be in conformity with Art 14 - *Nandi Lai Bajaj v State of Punjab* AIR 1981 SC 2041; (1981) 4 AXX 327.

A rule of procedure laid down by law comes as much within the purview of art 14 as any rule of substantive law and it is necessary that all litigants who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence without discrimination *State of WB v Anwar AH Sarkar* AIR 1952 SC 75; 1952 Cr LJ 510.

Article 14 not only guarantees equal protection as regards substantive laws but procedural laws also come within its ambit. The implication of the article is that all litigants similarly situated are entitled to avail themselves of the same procedural rights for relief and for defence without any discrimination *Shree Meenakshi Mills Ltd v Visvanatha Sastri* AIR 1955 SC 13; (1955) 1 SCR 787; see also *Lachman Dass v State of Punjab* AIR 1963 SC 222.

[11] The Supreme Court in *Lim Kar Bee*'s case was referring to a document which was *ex facie illegal*. If it is *ex facie illegal* arts 8(1) and 13(1) will not be applicable. *Ex facie illegal* means, the document on the face of it is illegal. The test is whether it is apparent on the face of it for breach of the law. It cannot be based on latent defect in the execution process and more so when it needs a curial scrutiny to ascertain its validity.

[12] An example, of a document *ex facie illegal* or patently illegal will be a compromise deed by a complainant of a criminal offence who agrees to withdraw the complaint or police report with or without consideration, (see *Keliment anak Nyapong & Ors (suing for themselves and their parents and other siblings) v Usha Bina Sdn Bhd* [2009] 1 MLJ 98; [2008] 1 LNS 550). An example, of a document which is alleged to suffer from latent defect is one which is alleged to be signed by unauthorised person or the signature is alleged to be a forgery, etc; where the burden will be placed on the party alleging to adduce evidence to satisfy the court to make a finding.

[13] Any attempt to seek a crucial scrutiny as to validity on the factual matrix of the instant case must procedurally be placed before the trial court and it cannot even be attempted at the appellate stage as what the appellant had attempted in the submission. Curial scrutiny if any and its result in the instant case will relate to finding of facts on mixed question of law and facts. As it was not done at the trial stage the appellant ought not to be allowed to canvass on this issue.

[14] We are also satisfied after having gone through the Act as well as the regulation, the document complained of is not *ex facie illegal*. In *Lim Kar Bee*'s case, the Supreme Court held:

A When the contract is not ex facie illegal, the court can still take judicial notice of illegality and refuse to enforce the contract even though illegality has not been pleaded *but only in the situation when facts which have not been pleaded emerge in evidence in the course of the trial showing clearly the illegality*. Such a situation exists in this appeal. (Emphasis added.)

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[15] In the instant case no opportunity was given to the trial court to consider whether the document was illegal to satisfy the test stated by the Supreme Court.

C **[16]** For reasons stated above, the appeal is dismissed with costs. The appellant to pay costs of RM20,000 to the respondent for this appeal. Deposit to be refunded to the appellant.

We hereby order so.

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Appeal dismissed with costs.

Reported by Afiq Mohamad Noor

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